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AUSTRALIAN AGRICULTURAL CO. v. FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA.

Solicitors, for the plaintiffs, *Sparke & Millard*, Newcastle, by *J. Stuart Thom Bros. & Co.*

Solicitors, for the respondents, *Sullivan Bros.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HART . . . . . APPELLANT;

AND

PALMER (OFFICIAL ASSIGNEE) . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 21.

Barton A.C.J., Gavan Duffy and Rich JJ.

THE appeal turned on questions of fact, and did not involve any point of law.

The appellant in person.

Milner Stephen and *Nicholas*, for the respondent, were not called on.

The judgment of the Supreme Court of New South Wales (*Street* J.) was affirmed.

Appeal dismissed.

B. L.

[HIGH COURT OF AUSTRALIA.]

MINISTER FOR LANDS (N.S.W.) . . APPELLANT;

AND

WHITFELD . . . . . RESPONDENT.

MINISTER FOR LANDS (N.S.W.) . . APPELLANT;

AND

MITCHELL AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1913.

SYDNEY, *Nov.* 19, 20, 21; *Dec.* 1.

Barton A.C.J., Isaacs, Gavan Duffy and Rich JJ.

Crown lands—Conflicting applications for holdings—Determination of order of priority by Local Land Board—Reference by Minister for Lands to Land Appeal Court—Crown Lands Act 1895 (*N.S.W.*) (58 *Vict. No.* 18), *sec.* 59—*Crown Lands Amendment Act* 1905 (*N.S.W.*) (*No.* 42 *of* 1905), *sec.* 28—*Crown Lands* (*Amendment*) *Act* 1908 (*N.S.W.*) (*No.* 30 *of* 1908), *sec.* 42.

Sec. 28 of the *Crown Lands Amendment Act of* 1905 (N.S.W.), after providing for the mode of determination by a Local Land Board of the order of priority of conflicting applications for holdings, provides that "(d) No determination of the order of priority, or decision of the board as to whether an applicant is or is not entitled to be included in a ballot to determine priority, shall be the subject of an appeal to the Land Appeal Court."

Sec. 59 of the *Crown Lands Act of* 1895, as amended by the *Crown Lands* (*Amendment*) *Act* 1908, provides that "The Minister may refer to the Land Appeal Court any decision or recommendation of a Local Land Board, whereby the rights, interests, or revenues of the Crown may have been, or may hereafter be injuriously affected, and may likewise refer any case where it may

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appear that a Local Land Board has, or shall have, failed, or neglected, to duly discharge its duty according to law, or that a Local Land Board has or shall have exceeded such duty, or that a rehearing or further consideration is warranted."

Held, that a reference to the Land Appeal Court under the latter section is not an appeal within the meaning of the former section, and, therefore, that the Minister may properly refer to the Land Appeal Court a determination by a Local Land Board that one of several applicants for a Crown lease of certain land had prior claims to any of the other applicants.

Decision of the Supreme Court of New South Wales: *In re Whitfeld and In re Mitchell*, 13 S.R. (N.S.W.), 93, reversed.

APPEALS from the Supreme Court of New South Wales.

Two cases were stated by the Land Appeal Court for the decision of the Supreme Court in pursuance of the provisions of sec. 8 (vi.) of the *Crown Lands Act of* 1889. They were in reference to two applications for leases of Crown lands, one by Alfred Eugene Whitfeld and the other by John Alexander Mitchell.

The case stated in reference to the application by Whitfeld was as follows:—

"1. By notification in the *Gazette*, dated 8th May and 5th June 1912, three areas of Crown lands in the land district of Inverell, numbered 68, 79, and 154 respectively, and comprising nine portions, were set apart under the *Crown Lands (Amendment) Act* 1912, to become available for application for Crown leases on and after 8th July 1912.

"2. Area No. 68 aforesaid comprised three portions of land numbered 48, 49, and 50 respectively, situate in the parish of Chigwell, county of Hardinge, in the said land district.

"3. Sixty-two simultaneous and conflicting applications were lodged for leases of portions within the said areas, amongst them being that of the respondent who applied for the said portions 48, 49, and 50, indicating in his application his preference for portion 50, of 2,018 acres. One A. A. Cross was also an applicant for portion 50 aforesaid.

"4. On 18th and 19th July 1912 the Local Land Board held a sitting at Inverell to consider the said applications, and on the 19th July gave the following decisions thereon:—

"'Whereas on 18th July 1912 it became a matter for investigation before us whether an application made at Inverell on 8th July 1912, by Alfred Eugene Whitfeld, for a Crown lease of 2,018 acres, county of Hardinge, parish of Chigwell, should be allowed, and having inquired into the said matter, we by majority (the chairman dissenting) are of opinion that A. E. Whitfeld has prior claims to any of the other applicants for this land, and we therefore allot portion 50, of 2,018 acres, to him, and postpone confirmation of his application for his attendance.

"'Whereas on 18th and 19th July 1912, it became a matter for investigation before us for consideration of the applications received for Crown Lease Area, No. 68, parish of Chigwell, county of Hardinge, No. 79, parish of Tienga, county of Hardinge, No. 154, parishes of Aston and Tienga, county of Hardinge, land district of Inverell, and having taken evidence and inquired into the said matter, we find that 62 applications were received and that they are simultaneous and conflicting. The Board by majority (the chairman dissenting) decided that Alfred Eugene Whitfeld has prior claims to any of the other applicants, and allotted portion 50, of 2,018 acres, parish of Chigwell, county of Hardinge, to him without going to ballot.

"'Being of opinion that the following persons do not possess equal claims to priority, we disallow their applications before the ballot, and direct refund of deposits, and survey fees in full, viz.:—'" (Then followed the names of certain persons).

"'We disallow the application of A. A. Cross before the ballot, the block applied for having been allotted to A. E. Whitfeld, and order refund in full.

"'A ballot in respect of the remaining applications was held, and resulted as shown on the ballot list. . . . . .'

"5. On 31st July the said Board (the chairman dissenting), confirmed the respondent's application for portion 50 aforesaid.

"6. On 28th August 1912 the Minister for Lands made the following reference to the Land Appeal Court:—

"'In pursuance of the provisions of sec. 59 of the *Crown Lands Act of* 1895, this case, which relates to Alfred Eugene Whitfeld's application, made at Inverell, on 8th July, 1912, for a Crown

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lease (1912-21), is referred to the Land Appeal Court for the following reasons :—

"'Three Crown leases, areas Nos. 68, 79, and 154, were set apart for Crown leases under the provisions of the *Crown Lands Act*, to become available therefor on and after 8th July 1912.

"'There were sixty-two simultaneous applications for the blocks within the said areas.

"'On 18th and 19th July 1912 the Local Land Board considered the applications, and by majority (the chairman dissenting) found that Alfred Eugene Whitfeld had prior claims to any of the other applicants for portion 50 of 2,018 acres—within Crown Lease Area No. 68, and allotted that portion to him—postponing the confirmation of his application for his attendance.

"'The Board then proceeded to deal with the remaining applications, disallowing fifteen of them before ballot, and ordering a ballot in connection with the others.

"'Having regard to the evidence and to the particulars given by Alfred Eugene Whitfeld in his application, and also to the fact that it had not been shown that the area held by him when added to the area of the Crown lease allotted to him will not be substantially in excess of a home maintenance area, it is considered that the Local Land Board should not have held that he had prior claims to any of the other applicants, and that in all the circumstances a rehearing or further consideration is warranted.'

"7. On the said reference coming before the Land Appeal Court, on 30th September 1912, objection was taken on behalf of the respondent that the Minister had no power in view of the provisions of sec. 28 of the Act of 1905, to make the reference inasmuch as the same purported to be against the Board's decision as to the order of priority.

"8. On 10th October last past the Land Appeal Court delivered judgment upholding the said objection, and refused to entertain the said reference, being of opinion that the finality contemplated by sec. 28 aforesaid could not be disturbed by a reference under sec. 59 of the *Crown Lands Act of* 1895.

"9. The appellant has duly requested the Land Appeal Court

to state a case for the opinion of the Supreme Court on the points of law following:—

"1. Whether the decision of the Local Land Board of the nineteenth day of July in the case set forth was a decision, or whether the case was a case, within the meaning of, and to which the provisions of, sec. 59 of the *Crown Lands Act of* 1895 apply.

"2. Whether the determination of the order of priority of conflicting applications by a Local Land Board, under the provisions of sec. 28 of the *Crown Lands Amendment Act of* 1905, may be the subject of a reference by the Minister for Lands to the Land Appeal Court under the provisions of sec. 59 of the *Crown Lands Act of* 1895.

"3. Whether, under the circumstances disclosed, the Minister for Lands had the power to make the said reference to the Land Appeal Board."

The case in reference to the application by Mitchell was as follows:—

"1. By a notification in the *Gazette* dated 8th May 1912 a parcel of land consisting of 2,410 acres, situated in the parish of Cochrane, county of Vernon, land district of Kempsey, was duly set apart as Crown Lease Area No. 91, to become available for application under the *Crown Lands* (*Amendment*) *Act* 1912, as a Crown lease on and after 10th June 1912.

"2. The said *Gazette* contained the following statement:—'All applications for Crown leases lodged by the applicant in person or by his agent in person duly authorized in writing, and all applications in posted letters received by the land agent at any time on 10th June 1912, or at any time between 10th June 1912 and 15th June 1912 inclusive, shall where conflicting, together be deemed to be and to have been lodged with such land agent simultaneously on 10th June 1912.'

"3. An application for the said lease was duly made by post by the respondent William Hackett, and the same was received by the Crown land agent at Kempsey aforesaid on 12th June 1912, and an application for the said lease was also duly lodged in person by the respondent John Alexander Mitchell on 15th June 1912.

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"4. On 17th June 1912 the said applications were considered by the Local Land Board, who gave the following decision :—

"'Whereas on 17th June 1912 it became a matter for investigation before us whether to consider conflicting applications for Crown lease, of portion 33, parish of Cochrane, county of Vernon, and having taken evidence and inquired into the said matter, we are of opinion that the application of William Hackett has not equal claims to priority with the application of J. A. Mitchell. We refuse the application of William Hackett, and direct refund of the moneys lodged. No appearance of William Hackett. We confirm the application of John Alexander Mitchell.'

"5. On 16th August 1912 the Minister for Lands made a reference to the Land Appeal Court as follows :—

"'In pursuance of the provisions of sec. 59 of the *Crown Lands Act of* 1895, this case, which relates to conflicting applications for a Crown lease by John Alexander Mitchell and William Hackett, lodged at Kempsey, 15th June 1912, and 12th June 1912, respectively, for portion 33 of 2,410 acres, parish of Cochrane, county of Vernon, is referred to the Land Appeal Court for the following reasons :—

"'On 17th June 1912 the Local Land Board, sitting at Kempsey, considered the applications.

"'William Hackett was not present before the Local Land Board owing to his not having received notice of the sitting until the night of 17th June, the date the meeting took place.

"'The Local Land Board confirmed John Alexander Mitchell's application (1912/2) Kempsey.

"'Having regard to the representations made by William Hackett in respect to the non-receipt, in time to admit of his attendance, of the notice to appear before the Land Board, and to the area held by John Alexander Mitchell, as disclosed in evidence, it is considered a further hearing or consideration is warranted, and the Land Appeal Court is requested to return the case to the Land Board for rehearing and further consideration of both applications.'

"6. The said reference was heard by the Land Appeal Court on 27th September last past, and on 10th October following the Court dismissed the same, holding that what the Board had done

in the matter was to determine, under the provisions of sec. 28 of the *Crown Lands Amendment Act of* 1905, the order of the priority of the said applications, and that no reference lay against the action of the Board in that connection.

"7. The appellant has duly requested the Land Appeal Court to state a case for the opinion of the Supreme Court on the points of law following:—" (The questions asked were the same as in Whitfeld's case).

The Full Court in each case answered the 2nd and 3rd questions in the negative, and did not answer the 1st question: *In re Whitfeld and In re Mitchell* (1).

From these decisions the Minister for Lands now, by special leave, appealed to the High Court.

The nature of the arguments sufficiently appears in the judgments.

Canaway K.C. (with him *Hanbury Davies*), for the appellant in each case, referred to *Ex parte Browne* (2); *In re Black* (3); *Minister for Lands* v. *Chapman* (4); *Ex parte Robinson* (5); *Gardiner* v. *Minister for Lands* (6).

Langer Owen K.C. and *Coffey*, for the respondent Whitfeld, referred to *Ex parte Giles* (7).

Cur. adv. vult.

Dec. 1.

BARTON A.C.J. read the following judgment:—In these two matters special cases have been stated to the Supreme Court by the Land Appeal Court at the instance of the Minister. They set out the facts, and the question of law in each case is the same. It arises upon sec. 28 of the *Crown Lands Amendment Act of* 1905, which substitutes certain provisions for those contained in sec. 20 of the Act of 1903. The provision in the Act of 1905 (as amended in 1908) is that subject to regulations which might be made thereunder "(a) The order of priority of conflicting

(1) 13 S.R. (N.S.W.), 93.
(2) 9 N.S.W.L.R., 102.
(3) 12 N.S.W.L.R., 37.
(4) 19 N.S.W.L.R., 9.
(5) 11 N.S.W.L.R., 57.
(6) 18 N.S.W.L.R., 182.
(7) 6 S.R. (N.S.W.), 384.

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applications for holdings," with certain exceptions not material to this case, "made, tendered, or lodged to or with the land agent simultaneously shall be determined by the Board; and where, in the opinion of the Board, any such applications have equal claims to priority, the order of their priority shall be determined by ballot. . . . . (b) Conflicting applications shall be dealt with by the Board in the order of their priority as determined in accordance with this section. (c) . . . . (d) No determination of the order of priority, or decision of the Board as to whether an applicant is or is not entitled to be included in a ballot to determine priority, shall be the subject of an appeal to the Land Appeal Court."

The determinations of the Local Land Board in respect of the applications of the several respondents, which in each case conflicted with other applications for Crown leases, were founded upon what the Board considered to be superior claims to priority. They were referred by the Minister to the Land Appeal Court. That Court decided that in view of the provisions of sec. 28 of the Act of 1905 the Minister had no power to make the reference, being of opinion "that the finality contemplated by sec. 28 aforesaid could not be disturbed by a reference under sec. 59 of the *Crown Lands Act of* 1895."

In effect, the Land Appeal Court decided that the reference in each instance was an appeal to that Court within the meaning of sec. 28 (d).

Sec. 59 of the *Crown Lands Act of* 1895, under which section the reference was made, says in its first paragraph that "the Minister may refer to the Land Appeal Court any decision or recommendation of a Local Land Board, whereby the rights, interests, or revenues of the Crown may have been, or may hereafter be injuriously affected, and *may likewise refer any case where it may appear* that a Local Land Board has, or shall have failed, or neglected, to duly discharge its duty according to law, or that a Local Land Board has or shall have exceeded such duty;" and the following words were added to the paragraph by sec. 42 and the Schedule of the Amendment Act of 1908:—"*or that a rehearing or further consideration is warranted.*"

In Whitfeld's case the Minister in his reference expressed the

opinion that "a rehearing or further consideration is warranted," and in Mitchell's case that "a further hearing or consideration is warranted," and in the latter case he requested the Land Appeal Court to return the case to the Land Board for rehearing and further consideration of the applications involved.

It is provided as part of the second paragraph of sec. 59 that no provision of the Principal Act in respect of the lodging of appeals shall apply to the notice of reference given by the Minister to the Registrar of the Land Appeal Court; but "the Land Appeal Court shall deal with the matter of such reference in the same way, and the rights and liabilities of the Crown in respect of such reference shall be the same, as if such reference were an appeal by the Crown."

The power which sec. 59 gives to the Minister is very wide. Its most material feature for present purposes is that the case may be referred where it appears—that is, appears to the Minister—that a rehearing or further consideration is warranted.

If the meaning of sec. 28 (d) of the Act of 1905 is that reference is for its purposes included in appeal, then the Minister had no power to proceed under sec. 59 in such a case as the present. The Supreme Court has, by majority, concurred with the Land Appeal Court in holding that view. Their Honors held a reference to be in substance an appeal, and they considered that the intention of sec. 28 was to give absolute finality to a "determination of the order of priority."

It will be observed, as was pointed out by *Sly* J. in his dissenting judgment, that the section speaks of the settlement of the order of priority of conflicting applications by the Board as a "determination" (see sub-secs. (a), (b) and (d)); and the legislature evidently thought that such a determination would be subject matter of appeal unless they made such a provision as we find in sub-sec. (d). The amended sec. 59 of 1895-1908 itself draws a clear distinction between appeals and references, and we were referred to a large number of provisions in the land legislation in support of the argument for the appellant that such a distinction was amply recognized by the legislature. Among these may be mentioned secs. 6 and 8 (iii.) of the Act of 1889; and it is worthy of note that the *Crown Lands Act* of 1912, which

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is the last legislation on the subject, has inserted the words "or reference" after the word "appeal" in sub-sec. (v.) of sec. 8 in such a way as not only to draw the distinction, but also to show that in the view of the legislature the giving of finality to an appeal does not exclude a reference in the absence of express mention. The distinction is again drawn in sub-sec. (vi.) of sec. 8. We find it again in sec. 43 of the same Act, and in sec. 3, sub-sec. (v.), of the amending Act of 1891. It re-appears in sec. 1 of the *Crown Lands Purchases and Leases Validation Act of* 1894, secs. 2 and 9 (v.) of the *Crown Lands Act of* 1895; and its distinctness in sec. 59 of the same Act has already been seen. Sec. 7 of the Act of 1905 is another very clear-cut example. Sec. 30 of the Amendment Act of 1908 shows it again; and in amending sec. 17 of the Act of 1884 the Statute of last year adds a proviso enabling the Minister to refer certain matters dealt with by a Land Board to the Land Appeal Court in place of the appeal which would have been necessary for the purpose but for this amendment.

I refrain from lengthy discussion of these instances. Their significance will be apparent to those who read the sections mentioned.

It was indeed argued that in some of these instances the words "appeal" and "reference" might have been used as convertible terms. It is true that they are capable of being so considered if taken by themselves; but when the instances are compared with provisions in which the two terms are used manifestly by way of contra-distinction, it becomes apparent that the intention is not to lose sight of that distinction or to treat the one term as equivalent to the other.

In view of the frequency and the clearness with which the legislature has drawn a distinction which it obviously understood between the two methods of procedure in question, and in view of its preservation of this distinction up to its last word upon the regulation of the Crown lands, I feel myself unable to say that in sec. 28 (d) of the Act of 1905 it abandoned suddenly a discrimination which characterized not only its prior but its subsequent enactments. For many purposes an appeal and a reference have similar incidents and similar results; but they

are entirely distinct proceedings; and a reference is in some cases applicable where the right of the Minister to appeal as a party may be open to doubt. In such cases I agree with the view expressed by *Innes* J. in *Ex parte Browne* (1), that where occasion arises for rehearing or further consideration in view of the public interest the Minister may be considered as invested with a supervising power "as a great trustee for the public in their beneficial ownership of the Crown lands." By sec. 59, especially as amended in 1908, such a power appears to have been entrusted to him in the widest terms, and in a manner which seems to give him a very large discretion in deciding upon the occasion for its exercise. The same view was tersely expressed by *Stephen* J. in the same case (2), where he said:—"I think that the policy of the Act is to give the Minister every possible power to secure the due administration of the lands with which he is charged—to prevent their being alienated—to correct every kind of error." It is evident that the learned Judge used the term "alienated" to express improvidence in alienation.

It is worth while, in the process of construction, to contrast sec. 28 (d) of the Act of 1905 with sec. 20 of the Act of 1884. The former provision merely forbids an appeal; but the latter provides that the decision of the Board "shall unless appealed from in the prescribed manner be final." I draw attention to this contrast of phraseology because it shows that when the legislature intended to impose finality, even under a condition, it knew how to express itself beyond all doubt. The clearness of sec. 20 is illustrated by the case of *Ex parte Robinson* (3).

Mr. *Owen* questioned whether a determination of the order of priority under sec. 28 could be the subject of a reference under sec. 59. I have no doubt that it is "a case" within the meaning of that section, and the amendment of 1908 uses apt words for the reference of a case, namely "rehearing" or "further consideration." The legislature has classed the settlement of the order of priority as a determination, and a question so determined seems to me to constitute a case.

I am of opinion that the appeals must be allowed, and answer the questions as follows:—

(1) 9 N.S.W.L.R., 102, at pp. 114, 115. (2) 9 N.S.W.L.R., 102, at p. 118.
(3) 11 N.S.W.L.R., 57.

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(1) The matter determined by the Land Board was a "case" within the meaning of the provisions of sec. 59 of the *Crown Lands Act of* 1895, and one to which those provisions apply.

(2) Yes.

(3) Yes.

ISAACS J. read the following judgment:—By the Act of 1884, sec. 14, the Local Land Board was empowered to sit as in open Court to hear and determine all complaints and other matters brought before it. The other matters included questions between the Crown and an applicant (see sec. 13).

By sub-sec. iv. of sec. 14, an appeal lay from the Board's decision to the Minister. And here a distinction must be made between the Minister acting judicially, and the Crown acting administratively. The Minister was supposed to be in a position to hold the scales of justice evenly between the Crown—that is, the public generally—and particular individuals. But that the Crown could be an appellant is not only recognized in certain cases to which Mr. *Canaway* referred, but is also expressly acknowledged by Parliament itself in sec. 8 of the Act of 1889, and in sec. 24 of the Act of 1912.

By sub-sec. iii. of sec. 8 of the Act of 1889 it is provided that "the Crown may without having lodged a caveat, appeared before the Local Land Board, given notice of appeal," &c., "appear as a party in all proceedings in which its rights, interests, or revenues may be concerned," &c.

That sec. 8 established the Land Appeal Court, the Act substituting that Court for the Minister in respect of appeals. The Minister was thenceforth placed in the position of administrative guardian of the rights of the Crown, as representing the general public with respect to public lands, and in that capacity entrusted with the power and duty of seeing that the provisions made by Parliament with respect to it were observed. He was given power for instance (sec. 6) to refer to the Land Appeal Court the question of appraisement, and (sec. 43) the question of extension of lease, after these had been determined by the Board.

The power of reference, was there obviously given to the

Minister so that, if he differed from the Board in respect of those matters which were not questions of strict law, reconsideration might be given to them by the light of departmental or administrative reasons, and yet by a non-political tribunal.

In the Act of 1895 Parliament extended this power of reference to any decision or recommendation of a Local Land Board affecting the rights, interests or revenues of the Crown, and also to "any case" where it appears that the Board either failed to discharge its duty according to law, or exceeded its duty, that is, overstepped its jurisdiction. Now, the important feature to observe there is, that the reference in the two latter classes is not for the purpose of compelling the Board to act, or restraining the Board from acting; it is for the purpose of having the very matter determined by the Land Appeal Court. And it is obvious that where the Land Appeal Court decides a case which the Board has wholly failed to decide, and which is therefore referred to the Land Appeal Court, the reference is not substantially in the nature of an appeal. It is then in substance original jurisdiction, attaching by reason of the reference.

And upon this a further consideration presents itself. A case referred under sec. 59 as it originally stood, for neglect or excess of duty, would be one concerning private individuals, contests between them, because Crown interests are provided for in an earlier part of the section. Consequently, when in the next paragraph of the section, the direction that the Land Appeal Court is to deal with the matter of such reference as if the reference were an appeal by the Crown, does not exclude the notion that the decision may be as between individuals only, the mention of a Crown appeal being for the purpose of assimilating the course of procedure to be followed and the nature of the decision that may be given.

Once that position is grasped, it is seen that the section as it stood in 1895 enabled the Crown, as always interested on behalf of the public in the lawful and fair allotment of public lands to see that in the cases included within sec. 59 no injustice is done so far as a summary reference to the Land Appeal Court could prevent it.

That summary process—so far as the neglect or excess of duty

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was concerned—was an alternative for mandamus and prohibition, and not another form of appeal.

Now we come to sec. 28 of the Act of 1905. That section, after providing for the determination by the Board of the order of priority of conflicting applications, enacted that there should be no appeal from any such determination. The contention of the respondent is that Parliament in so enacting intended the determination to be final. So the Supreme Court have held. And I agree entirely with the argument up to that point. But the reason must be remembered: appeal at that time was the only form of possible reconsideration of such a determination. There had up till then been no power enacted of referring such a determination. Consequently, the determination was final, not because Parliament expressly said so, for it did not say so, but because it had taken away the only then existing method of challenging it.

But it is a material circumstance that Parliament, did not say, in so many words, it should be final. And, therefore, when in 1908 it enlarged the power of reference by adding to sec. 59 of the Act of 1895 the words "or that a rehearing or further consideration is warranted," the question is whether there is any reason why these large and comprehensive words ought not to include such a case as the present. Remembering that the section already comprised cases in which the interests of individuals alone were immediately concerned, the fact that Crown interests are not directly involved is no such reason.

The facts that in *Minister for Lands* v. *Chapman* (1), decided in 1898, the Supreme Court had in effect held that a reference under sec. 59 of the Act of 1895 was not an appeal within the meaning of sec. 20 of the Act of 1884, and that Parliament passed the additional words in 1895 after that decision, and had also repeatedly discriminated between "appeal" and "reference," all point to the legislative recognition of the legal distinction between those terms.

The respondent has the task of satisfying the Court that two words, primarily distinct, are identical; and not only has that proved impossible, but all the evidences gathered from the Acts lead to the opposite conclusion.

First of all, reading sec. 59 of the Act of 1895 and sec. 28 of

(1) 19 N.S.W.L.R., 9.